

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

MR. C MANAGER, LLC,

Employer

and

UNITE HERE LOCAL 11

Petitioner

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Case 31-RC-249624

**PETITIONER UNITE HERE LOCAL 11'S BRIEF IN OPPOSITION TO EMPLOYER'S
REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION TO ADOPT
HEARING OFFICER'S RECOMMENDATIONS, COUNT CHALLENGED BALLOTS
AND OVERRULE OBJECTIONS**

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I. INTRODUCTION

Pursuant to Section 102.67(f) of the Board's Rules and Regulations, UNITE HERE Local 11 ("Union") respectfully submits this Opposition to Employer's Request for Review of the Regional Director's Decision to Adopt Hearing Officer's Recommendations, Count Challenged Ballots, and Overrule Objections issued on February 7, 2020 ("Decision to Adopt"). The Employer's entire Request for Review depends on a reversal of longstanding precedent on the standard for accountability in the Board's analysis of responsible direction. Yet as discussed below, the outcome in this case would be no different even under the Employer's proposed standard. No compelling reasons exist under Section 102.67(d) of the Board's Rules and Regulations for granting the Employer's Request for Review.

II. THE ROOM INSPECTORS DO NOT RESPONSIBLY DIRECT EMPLOYEES UNDER CURRENT BOARD LAW OR THE EMPLOYER'S FAVORED ALTERNATIVE

a. The Regional Director correctly applied the Board's current standard for responsible direction.

The Board has held that "responsible direction" under Section 2(11) of the Act requires that "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006). This "emphasis on accountability" was meant to prevent the definition of responsible direction from becoming overly expansive. *Id.* In order to establish responsible direction, the putative supervisor must be held accountable for the performance of the employees they direct, not simply the putative supervisor's own performance. *G4S Government Solutions, Inc.*, 363 NLRB No. 113, slip op. at 1 (2016), citing *Oakwood Healthcare*, 348 NLRB at 695; *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006); *Entergy*

Mississippi, Inc. v. N.L.R.B., 810 F.3d 287, 295 n. 1 (5th Cir. 2015) (“Every circuit court that has interpreted *Oakwood* has read it to require responsibility for others’ actions.” (citations omitted)).

As the Employer acknowledges in its Request for Review, the current Board recently affirmed an Administrative Law Judge’s decision applying the *Oakwood* accountability standard. *DH Long Point Management LLC*, 369 NLRB No. 18, slip op. at 5 (Feb. 3, 2020), citing *Oakwood Healthcare*, 348 NLRB at 691-92 (“Responsible direction means not only being able to take action to ensure tasks are performed correctly by an employee, but also being accountable for that performance, i.e., there is a prospect of material consequences to the alleged supervisor if the employees he/she directs do not perform their tasks correctly.”). Although the Employer attempts to make the spurious argument that the Regional Director’s decision in the instant case relies on the “narrow interpretation of *G4S Government Solutions, Inc.*,” the accountability standard articulated in *G4S Government Solutions, Inc.* is simply the standard of *Oakwood Healthcare*. *G4S Government Solutions, Inc.*, 363 NLRB No. 113, slip op. at 1. Because the current Board has already considered and affirmed the longstanding *Oakwood* accountability standard relied upon by the Regional Director, there exist no “compelling reasons for reconsideration of an important Board rule or policy.” Section 102.67(d)(4) of the Board’s Rules and Regulations.

b. Even under the Employer’s proposed accountability standard, the room inspectors do not exercise responsible direction.

In its Request for Review, the Employer requests that the Board apply a different accountability standard based on dissenting opinions in *Entergy Mississippi*, 357 NLRB 2150 (2011) and *SR-73 and Lakeside Avenue Operations LLC d/b/a Powerback Rehabilitation, 113 South Route 73*, 365 NLRB No. 119 (2017). Under this standard, accountability should be found based upon the putative supervisor being held responsible for their *own* performance, rather than

the performance of the other employees, in directing and overseeing the work of subordinate employees.

But even if the Employer's proposed accountability standard were applied to this case, the room inspectors still would not meet it. The room inspectors perform a quality control function by inspecting guest rooms to ensure that they conform to the hotel's strict and detailed luxury standard, which allows for no discretion. (Tr. 286-89; 364-65; 381-82; 448-49.)¹ Their responsibilities are limited to identifying issues and notifying the housekeeping coordinator or supervisors. They are required to call the housekeeping coordinator or supervisor in the housekeeping office to inform them of any issues they identify in a room. (Tr. 294-96; 390; 454.) The only exception is when the issue is minimal and can be quickly and easily addressed by the inspector, such as placing a missing pen. (Tr. 323-24.) The housekeeping coordinator or supervisor, not the inspector, decides which employee will address the issue identified. (Tr. 296-97; 391; 468.)

Crucially, room inspectors are not responsible for ensuring that the room attendant, houseperson, or minibar attendant actually addressed the issue identified. Consistently with this policy, room attendants notify the housekeeping coordinator, not the inspector, when they have finished addressing an issue. (Tr. 357.) Room inspectors do not "reinspect" a room by returning to it later during a shift, except in rare occasions when instructed by a supervisor. (Tr. 302; 330; 396; 470-72.) Nor do they wait, after having identified an issue, for a room attendant to return to the room, unless a supervisor orders them to do so. (Tr. 299; 455.)

Furthermore, the room inspectors have no power to issue orders other employees—their only job is to inform. When a room attendant has a disagreement with an inspector, the inspector

¹ All references to the post-hearing transcript are indicated as "Tr."

has lacks the authority to order the room attendant to correct the issue that the inspector has identified in the room. (Tr. 300-01.) This lack of authority further illustrated by inspector Nancy Uribe's testimony that when she has disagreements with room attendants, "sometimes they just yell at me, leave me talking by myself . . . I'm talking to them and they just turn around and they get upset and they leave." (Tr. 300.) Other employees' duty to fix discrepancies in a room derives from their responsibility to properly service the rooms as part of their daily work assignment—not to obey the inspectors. (Tr. 300-01.)

The room inspectors' only role is to perform a quality control function at the hotel. The Board has consistently held that quality control employees are not supervisors under the Act. In *Modesto Hospitality, LLC, d/b/a Doubletree Hotel Modesto*, 2008 NLRB Reg. Dir. Dec. LEXIS 59 (2008) (Case 32-RC-5546), the Employer, a hotel, argued that its housekeeping supervisors were supervisors under Section 2(11) of the Act. The housekeeping supervisors spent the "vast majority of their time functioning in a quality control capacity." *Id.* at *13. Part of their duties was to inspect guest rooms cleaned by room attendants. The Regional Director concluded that this task did not require the exercise of independent judgment:

The Employer provides the housekeeping supervisors with detailed criteria for inspecting the guest rooms cleaned by the room attendants. The Employer's inspection form identifies approximately 62 items with corresponding numerical values totaling 100 points. The housekeeping supervisors deduct points for deficiencies; for example, the failure to place fresh soap on a clean soap dish merits a 1 point deduction. However, housekeeping supervisors do not regularly complete the inspection form; thus, the Employer has instructed them to commence doing so more frequently. Moreover, the record does not establish that these forms have historically been used to discipline employees or initiate the disciplinary process. **The mere ability to point out tasks that the employees have not performed properly in accordance with the Employer's criteria, to make sure the employees perform their duties, and to call their attention to a particular task that has not been performed properly, does not require independent judgment.** *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001); *Evangeline of Natchitoches, Inc.*, 323 NLRB 223, 223-224 (1997). As noted earlier, the tasks performed by the room attendants are limited, repetitive,

and well-known to the employees, thereby reducing the degree of independent judgment in directing such tasks. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002); *Beverly Health and Rehabilitation Services, Inc.*, *supra*.

Id. at *25-27 (emphasis added).

Similarly, in *Janesville Auto Transp. Co.*, 193 NLRB 874 (1971), the Board found that loading dock inspectors, who were empowered to assure trailers were loaded according to the Employer's manual, to order a load to be reloaded, and to investigate any possible failures by drivers to follow the rules, did not exercise independent judgment and were thus not supervisors within the meaning of Section 2(11). The Board explained that "the authority of inspectors, who are primarily responsible for the quality of a product, to halt production and have employees make up defective work, just as the inspectors are authorized to do here, does not require the conclusion that they are supervisors within the meaning of the Act." *Id.* at 875, citing *Chase Aircraft Co., Inc.*, 91 NLRB 288, 291 (1950).

It is clear that the responsibilities of the room inspectors in this case parallel those of the quality control employees in *Modesto Hospitality* and *Janesville Auto Transp. Co.* As in *Modesto Hospitality*, management provides inspectors with "detailed criteria for inspecting the guest rooms cleaned by room attendants." *Id.* at *25-26. In fact, the room inspectors have even *less* authority than the employees at issue in both of these cases. In *Modesto Hospitality*, the housekeeping supervisors were empowered to "make sure the employees perform their duties." *Id.* at *26. In *Janesville*, the inspectors could "halt production and have employees make up defective work." *Id.* at 875. The room inspectors here cannot order room attendants to do anything—nor is it their responsibility to ensure that issues are actually addressed. Accordingly, even under the Employer's proposed standard for accountability, the room inspectors do not exercise responsible direction.

The Employer argues that *Dunkirk Motor Inn, Inc., d/b/a Holiday Inn of Dunkirk-Fredonia*, 211 NLRB 461 (1974) supports its position. In that case, the Board upheld the hearing officer's finding that the "Assistant Housekeeper" responsibly directed maids because, *inter alia*, she inspected rooms that maids cleaned and could "order maids to take corrective action when she deems it necessary." *Id.* at 462. Here, however, the inspectors not only cannot "order" room attendants to take any correction action, but they also have no discretion in deciding whether to notify the housekeeping office of an issue in a room (aside from minor issues like a missing pen). (Tr. 294-96; 300-01; 388-90.) As discussed above, the inspectors' inspections are dictated down to the finest detail by the standard set by management. Furthermore, the "Assistant Housekeeper" in *Holiday Inn* was salaried, "grants time off to maids and replaces them in the event of illness, participates in interviewing applicants whose qualifications she discusses with the housekeeper, regularly replaces and performs the functions of the housekeeper on her days off, and attends managerial meetings." *Id.* at 461-62. The inspectors here share none of these attributes or authorities.

Finally, the Employer argues that the Regional Director "incorrectly concludes . . . that the Employer may not satisfy that standard through reliance upon authority set forth in job descriptions and performance evaluations because it is 'paper' rather than actual authority." Employer's Request for Review at 9. This simply misstates the Regional Director's analysis, which is that "[t]he Employer's reliance on 'paper authority' found in the room inspectors' job descriptions and performance evaluations over actual authority is misplaced and insufficient to establish actual supervisory authority under Section 2(11) of the Act." Decision to Adopt at 9, n. 7 (citations omitted). This conforms with the Board's policy to privilege actual authority over mere titular or theoretical power. *See Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006),

citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). As discussed above, even when such paper authority is taken into account, the record evidence shows overwhelmingly that the inspectors lack the authority responsibly to direct, even under the Employer's proposed standard for accountability. Furthermore, the job descriptions for housepersons, room attendants, and minibar attendants indicate that they report to the Housekeeping Manager or Director of Housekeeping, not the room inspectors. *See* Union Exhibit 10.

In conclusion, the room inspectors clearly do not meet even the Employer's proposed standard for accountability, which is itself contrary to longstanding precedent that this Board has recently affirmed. The Board should affirm the Regional Director's finding that the room inspectors are not supervisors and decision to open and count their ballots.

III. EVEN IF ROOM INSPECTOR MARQUEZ WERE A SUPERVISOR, EMPLOYER'S OBJECTION 5 WOULD STILL PROPERLY BE OVERRULED.

Because none of the three room inspectors are supervisors under the Act, the Regional Director properly analyzed room inspector Omar Marquez's alleged statement under the third-party standard. For the reasons set forth in the Decision to Adopt, Marquez's conduct was not objectionable and Employer's Objection 5 was properly overruled. Indeed, the Employer does not contest any of the Regional Director's findings or conclusions with respect to its application of the test for third-party conduct.

Instead, the Employer in its Request for Review only argues that in the hypothetical scenario that Marquez is found to be a supervisor under the Act, the Board should further find that, under the standard for supervisory conduct on behalf of a union, the alleged statement of inspector Marquez was objectionable conduct sufficient to overturn the election. Even under this standard, however, Employer's Objection 5 should be overruled.

The Board's two-prong test for objectional pro-union supervisory conduct considers:

(1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.

This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside Healthcare, Inc., 343 NLRB 906, 909 (2004).

With respect to the first prong, Marquez's alleged statement did not tend to coerce or interfere with room attendant Miriam Castellanos's exercise of free choice in the election. As discussed above, Marquez has no supervisory authority at all, much less supervisory authority over Castellanos in particular. Marquez would not have been capable of carrying out the threat, as he does not have the authority to fire or to make section or room assignments. Thus, Marquez had "no authority over the employee[] to whom the conduct was directed." *Glen's Market*, 344 NLRB 294, 295 (2005).

The Employer relies on *Domino's Pizza, LLC*, 368 NLRB No. 142, slip op. at 2 (December 16, 2019), in which the Board stated that "a supervisor's express threat is coercive under the first prong, whether or not the supervisor possesses the specific authority to effectuate the threat." However, Marquez's alleged statement is distinguishable. The supervisor at issue in *Domino's Pizza* told three employees that they would lose their jobs if the union lost the election and told a fourth employee that they would not have jobs if the union won. *Id.* With these facts, the Board found that these threats were coercive under the first prong of *Harborside* because "express statements that employees will lose their jobs based on the election result cannot be

construed as anything but highly coercive attempts to induce employees to vote for the union.”

Id.

Castellanos testified that Marquez said to her that “they were going to run me out of there and they were going to take me off the residences.” (Tr. 72.) She added, “So if I would get into the Union, they will run us out of the residences because it was all based on seniority.” Unlike the express threats in *Domino’s Pizza*, the meaning of Marquez’s alleged statement is unclear. It is not obvious who “they” refers to. It is also ambiguous as to how and why she would lose her job or be reassigned away from the residences because the system is based on seniority. Because the nature of the alleged statement is ambiguous and lacks clarity, it does not constitute an “express threat” and did not reasonably tend to coerce or interfere with Castellanos’s exercise of free choice in the election.

With respect to the second prong, Marquez’s alleged statement could not have materially affected the outcome of the election. The margin of victory has not yet been determined because the three challenged ballots of the room inspectors have not been opened and counted.

Marquez’s alleged statement was made only once to one employee and was not repeated or disseminated to other employees. (Tr. 92; 97.) There was no testimony suggesting that the conduct had any lingering effect. Finally, because the statement is objectively ambiguous, it is unclear what effect it would have had, if any, on the listener.

Finally, there are strong reasons to doubt the credibility of Castellanos’s allegation. First, two witnesses testified that they saw Castellanos ostentatiously flipping off participants in a Union picket line outside the hotel in the weeks prior to the election. (Tr. 319-20; 596-97.) Second, Castellanos testified that at the time of the alleged remark, Marquez noted an issue with the baseboards in the room she had cleaned. (Tr. 94.) Marquez had only interacted with

Castellanos in the course of their work between 5-10 times total and the specific timeframe of Castellanos's allegation. The Employer should have easily been able to find and introduce a record of Marquez's noting of this issue in the room, yet it failed to do so. Third, Marquez gave credible testimony about his previous interactions with Castellanos that flatly contradicted her allegations. (Tr. 479.)

In conclusion, Marquez's alleged statement to Castellanos is not grounds for setting aside the election, even when analyzed under the standard for supervisory conduct.

IV. CONCLUSION

For the reasons set forth herein, the Petitioner respectfully requests that the Board deny Employer's Request for Review in its entirety and affirm the Regional Director's decision to open and count the ballots of room inspectors Omar Marquez, Rosalia Rodriguez, and Nancy Uribe and dismiss the Employer's Objections.

Dated at Los Angeles, California, this 28th day of February, 2020.

Respectfully submitted,

/s/ Charles Du

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petitioner's Brief in Opposition to Employer's Request for Review of the Regional Director's Decision to Adopt Hearing Officer's Recommendations, Count Challenged Ballots, and Overrule Objections was e-filed in accordance with NLRB requirements and served via electronic mail, this 28th day of February, 2020, upon:

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